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RECENT DEVELOPMENT

PROCEDURE—RIGHT TO A JURY TRIAL IN ACTIONS AGAINST CORPORATIONS OWNED BY FOREIGN GOVERNMENTS

TABLE OF CONTENTS

I. INTRODUCTION

Three federal circuit courts of appeals recently have held that United States citizens are not entitled to a jury trial in an action against a commercial corporation owned by a foreign government. The Second, Third, and Fourth Circuit Courts of Appeals[1] agree that the Foreign Sovereign Immunities Act (FSIA),[2] the sole basis for federal subject matter jurisdiction, provides only for nonjury trials in legal actions against commercial corporations owned by a foreign government. These courts also agree that this statutory denial of a jury trial does not abridge a citizen's seventh amend-

1. Rex v. Cia. Pervana de Vapores, S.A., 660 F.2d 61 (3d Cir. 1981); Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981); Ruggiero v. Compania Peruana de Vapores, 639 F.2d 872 (2d Cir. 1981).

2. 28 U.S.C. §§ 1330, 1602-1611 (1976).

ment right.[3] These decisions are important because of the "widespread and increasing practice on the part of governments of engaging in commercial activities."[4] This Recent Development examines the legal backgrounds of sovereign immunity and the right to a jury trial, the recent decisions, and the analysis adopted by each of the circuit courts.

II. LEGAL BACKGROUND

A. Sovereign Immunity

The modern doctrine[5] of immunity for foreign sovereigns, their agents, and instrumentalities was first enunciated by Chief Justice Marshall in *The Schooner Exchange v. McFaddon.*[6] *The Exchange,* allegedly taken by force from United States citizens, entered the port of Philadelphia as a French man-of-war to take on supplies and to effect repairs.[7] The former owners filed a libel in rem seeking the vessel's return. The Court held that a public armed vessel in the service of a foreign sovereign with whom the United States is at peace enters United States ports "under an implied promise" that she will be free from judicial process.[8] Chief Justice Marshall explained that this immunity, although absolute, is grounded in concepts of comity. This must be so, explained the Court, because immunity is an exception to the "full and complete power of a nation within its own territory" and thus "must be traced up to the consent of the [host] nation."[9] Furthermore, dictum in the decision established[10] a distinction between

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3. U.S. CONST. amend. VII. The seventh amendment preserves the right to trial by jury in actions at law, not in actions in equity or admiralty. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830).

4. Letter from Jack B. Tate, Acting Legal Advisor to the Department of State, to Phillip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984, 984 (1952).

5. Triggs, *Restrictive Sovereign Immunity: The State as International Trader,* 53 AUSTL. L.J. 244, 245 (1979). Grotius maintained that ambassadors and their property should be immune from judicial process and executive action. H. GROTIUS, DE JURE BELLI ET PACIS 216 (Whewell trans. 1853).

6. 11 U.S. (7 Cranch) 116 (1812).

7. *Id.* at 117.

8. *Id.* at 146.

9. *Id.* at 135.

10. Grotius recognized that some acts "are not done by the king as king, but by him as by any other person." H. GROTIUS, *supra* note 5, at 178.

the public and the private acts of a foreign sovereign.[11] The United States attorney, arguing for immunity, said, "if a sovereign descends from the throne and becomes a merchant, he submits to the laws of the country."[12]

The Court later applied this distinction between a sovereign's public acts and its commercial acts in *Bank of United States v. Planter's Bank of Georgia*.[13] "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."[14]

English courts addressed the question of immunity for foreign, government-owned vessels in *The Parlement Belge*[15] and *The Porto Alexandre*.[16] In *The Parlement Belge* the Court of Appeal held that an action in rem could not lie against a vessel owned by the Kingdom of Belgium which was used primarily for public activity and subordinately for commercial activity.[17] *The Porto Alexandre* presented a different situation. Portugal owned *The Alexandre* and used it exclusively for commercial activity.[18] Plaintiff, citing the language from *Planter's Bank* quoted above, argued that the nature of the activity was the controlling consideration[19] and that the vessel lost any possible immunity because of the commercial nature of its activities.[20] The Court of Appeal rejected this argument and held that a vessel owned by a foreign sovereign is immune from judicial process regardless of the nature of its activity.[21]

The United States Supreme Court in 1926 handed down *Be-*

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11. *The Schooner Exch.*, 11 U.S. (7 Cranch) at 144.

12. *Id.* at 123. Explaining the limits of the Court's decision, Chief Justice Marshall said, "[I]t may safely be affirmed, that there is a manifest distinction between private property of the person who happens to be a prince, and the military force which supports the sovereign power . . . ." *Id.* at 144.

13. 22 U.S. (9 Wheat.) 904 (1824).

14. *Id.* at 907.

15. 5 P.D. 197 (1880).

16. 1920 P. 30.

17. 5 P.D. at 214-15. The court based its decision upon the equality of all sovereigns and the comity thus due. *Id.* at 207-08.

18. 1920 P. 30, 34.

19. *Id.* at 32.

20. *Id.*

21. *Id.* at 34, 35, 38.

rizzi Brothers Co. v. The Pesaro,[22] in which the Court adopted a doctrine similar to the English doctrine of sovereign immunity. The Italian government owned and operated *The Pesaro* solely for commercial activity.[23] The Department of State refused to recommend immunity because of the commercial nature of the activity.[24] The Court, however, granted immunity and held that merchant vessels owned and controlled by foreign sovereigns for the purpose of "advancing the trade of its people or providing revenue for its treasury" are public vessels in the same sense as men-of-war.[25] The Court noted that, although only private citizens operated merchant vessels in 1812 and "there was little thought of governments engaging in such operations,"[26] it nevertheless considered the principles of *The Schooner Exchange*[27] to be controlling.[28] The Court thus held, as the English Court of Appeal had held in *The Porto Alexandre,* that a foreign, government-owned vessel is immune from judicial process regardless of the nature of its activity.[29]

While the United States and Great Britain were adopting this position, other nations were negotiating the International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels (hereinafter referred to as the Convention).[30] Twenty-one nations signed the Convention on April 10, 1926.[31] The United States was not a signatory. The Con-

22. 271 U.S. 562 (1926).

23. *Id.* at 570. The plaintiff filed a libel in rem against the vessel in an attempt to recover damages allegedly caused by the failure to deliver artificial silk to New York. *Id.* at 569. After the vessel was seized, the Italian Ambassador appeared and argued that the vessel was immune from judicial process because the vessel was owned and possessed by Italy. *Id.* at 570.

24. *The Pesaro,* 277 F. 473, 479-80 & n.3 (S.D.N.Y. 1921). Defendants, wishing to raise the defense of sovereign immunity, petitioned the Department of State for an immunity ruling. The Department of State sent a letter explaining its position to the district court. *See* Recent Development, *Sovereign Immunity,* 13 VAND. J. TRANSN'L L. 835, 837 (1980).

25. *Berizzi Bros.,* 271 U.S. at 574.

26. *Id.* at 573.

27. 11 U.S. (7 Cranch) 116 (1812).

28. *Berizzi Bros.,* 271 U.S. at 573.

29. *Id.* at 576.

30. Apr. 10, 1926, 176 L.N.T.S. 199.

31. *Id.* at 211-15. The signatory nations were Germany; Chile; Belgium; Denmark; Brazil; Spain; France; Estonia; Hungary; Italy; Japan; Latvia; Mexico; Norway; the Netherlands; Poland; Portugal; Great Britain; Rumania; Sweden; and the Kingdom of Serbs, Croats, and Slovenes.

vention provided that, for purposes of immunity, state-owned commercial vessels would be treated in the same manner as privately-owned vessels.[32]

Eighteen years after the Convention, the United States Supreme Court, in *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar,*[33] took a step backward from its decision in *The Pesaro. The Navemar* involved a ship allegedly seized by its crew. A libel in rem was brought in a federal district court by petitioner Compania Espanola, a private Spanish corporation which claimed ownership of the vessel. The government of Spain also claimed ownership and its Ambassador sought to raise the protection of sovereign immunity.[34] The Department of State refused to recommend immunity for the vessel. Because the evidence at hand did not suggest that *The Navemar* had been in the possession of the Spanish government, the Court held that the government of Spain was not entitled to sovereign immunity, but must intervene on remand for the purpose of establishing ownership.[35] Although the facts of *Mexico v. Hoffman*[36] were similar[37] to those of *The Navemar,* the Court's focus was quite different. In *Mexico v. Hoffman* the Court focused directly upon the refusal of the Department of State to recommend immunity for a vessel that was owned by the government of Mexico but operated by a private corporation under contract.[38] The Court denied immunity to the defendants; it did not, however, deny immunity to every vessel engaged in commercial activity,[39] although Justice Frankfurter encouraged this approach in his concurrence.[40]

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32. *Id.* at 207.

33. 303 U.S. 68 (1938).

34. *Id.* at 75. The Spanish Ambassador filed a suggestion arguing that the vessel was immune from judicial process because it was owned by Spain, but the Department of State did not recommend immunity. *Id.* at 75-76. In dictum, the Court said that if the Executive Branch recommended immunity, it was "the duty of the courts to release the vessel." *Id.* at 74.

35. *Id.* at 76.

36. 324 U.S. 30 (1945).

37. Respondent filed a libel in rem seeking to recover damages caused when the Mexican vessel collided with respondent's fishing boat. *Id.* at 31. The Mexican Ambassador filed a suggestion alleging that the vessel was immune because it was owned by Mexico. *Id.*

38. *Id.* at 34-35.

39. *Id.* at 35.

40. *Id.* at 40-41 (Frankfurter, J., concurring). Justice Frankfurter asserted that possession was an improper test for immunity. *Id.* at 40. He considered the

Although most writers on sovereign immunity focus on the development of the law surrounding vessels, it is also important to consider the treatment of corporations owned by foreign governments.[41] The development of immunity in maritime law is distinct from the development of immunity in the corporate context. Chief Justice Marshall's recognition of the distinction between the public governmental acts of a sovereign and its private commercial acts[42] in *The Schooner Exchange* provides the basis for the development of a doctrine of immunity for foreign, government-owned corporations. The difference in approach is particularly significant for this Recent Development because actions against government-owned vessels arise in admiralty wherein no right to a jury trial exists.[43]

Planter's Bank[44] established the proposition that corporations owned by the United States and engaged in commercial activity are not immune from suit. *Molina v. Comision Reguladora del Mercado de Henequen*[45] was the first United States case to confront the question of immunity for corporations owned by foreign sovereigns. Mexico created Comision, a commercial corporation, to trade in sisal. Molina sued Comision for conversion. Pursuant to traditional practice, the Department of State declined to recommend immunity because of the commercial nature of Comision's activity.[46] Comision argued for immunity because Mexico, a foreign sovereign, owned its stock.[47] The New Jersey Supreme Court found this proposition to be a "startling one"; furthermore, the court found "no authority . . . for the proposition that foreign corporations which happen to be governmental agencies are immune from judicial process."[48] A federal district court reached the same result in *Coale v. Societe Co-operative Suisse des Char-*

"enormous growth" of governmental participation in commercial activities probative and urged adoption of a test rejecting immunity when a sovereign engaged in commercial activity. *Id.* at 39-41.

41. "The fundamental characteristic of a corporation is that it . . . has an existence separate from its shareholders." R. DEET, THE LAWYER'S BASIC CORPORATE PRACTICE MANUAL 7 (2d ed. 1978).

42. *See supra* text accompanying notes 13 & 15.

43. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830).

44. 22 U.S. (9 Wheat.) 904 (1824); *see supra* text accompanying notes 13-14.

45. 91 N.J.L. 382, 103 A. 397 (1918).

46. *Id.* at 384-85, 103 A. at 398.

47. *Id.* at 386, 103 A. at 399.

48. *Id.* at 386-87, 103 A. at 399.

bons,[49] which involved a Swiss government-owned corporation established to trade in coal. The *Coale* court rejected defendant's request for immunity stating that if Switzerland chose to do business by means of a corporation, then the corporation was liable for its obligations. The court found "no case which holds otherwise."[50] The same court recognized the distinct identity of a foreign, government-owned corporation in *United States v. Deutsches Kalisyndikat Gesellschaft*.[51] France owned eleven-fifteenths of a corporation organized to trade in potash. The United States sued the corporation for violations of the antitrust laws and the Department of State declined to recommend immunity because of the commercial nature of the activity.[52] The French ambassador appeared and requested immunity for the corporation, citing *The Schooner Exchange, The Pesaro,* and *The Parlement Belge*. The court rejected the ambassador's arguments, observing that the law under which the corporation was formed provided that the corporation could sue and be sued.[53] This, the court said, deprived the corporation of any immunity. "A suit against a corporation is not a suit against a government merely because it has been incorporated by direction of the government, and is used as a governmental agent, and its stock is owned solely by the government."[54] The court noted that sovereign immunity is a matter of comity and is based upon the consent of the host nation.[55] *Deutsches* is particularly significant because it rejected the defendant's citation of *The Pesaro,* ruling that case inapplicable in the corporate context. At a time when commercial government-owned vessels were afforded broad immunity, the court refused to grant immunity to a corporation owned and controlled by a foreign sovereign.

Soon after Justice Frankfurter's concurrence in *Mexico v. Hoffman*,[56] the Department of State issued the Tate Letter,[57] which

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49. 21 F.2d 180 (S.D.N.Y. 1921).
50. *Id.* at 181.
51. 31 F.2d 199 (S.D.N.Y. 1929).
52. *Id.* at 200.
53. *Id.* at 202.
54. *Id.*
55. *Id.* at 203.
56. *See supra* note 40 and accompanying text.
57. Letter from Jack B. Tate, Acting Legal Advisor to the Department of State, to Phillip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984, 984 (1952).

reviewed the law of other countries and expressly adopted the position that immunity was unavailable to a foreign government when it engaged in commercial conduct.[58] The Tate Letter clarified purportedly long-standing policy[59] and remained the leading expression of United States jurisprudence on sovereign immunity until Congress enacted the Foreign Sovereign Immunities Act (FSIA or Act)[60] in 1976. One of the primary objectives of the FSIA is to ensure that questions of sovereign immunity are left exclusively to the courts, thus avoiding the political and diplomatic pressures exerted upon the Department of State.[61] The FSIA codified the restrictive theory of sovereign immunity, which divests a foreign sovereign of immunity when engaged in commercial activities.[62] The FSIA applies to all "foreign states," which is defined to include corporations owned by a foreign sovereign.[63]

B. The Seventh Amendment

The seventh amendment to the United States Constitution provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[64] In *Pernell v. Southall Realty*,[65] the Supreme Court explained that the right to a jury trial depends on the nature of the action rather than upon the state of English law as incorporated by the seventh amendment in 1791.

> Whether or not a close equivalent to [the statute giving rise to the action] existed in England in 1791 is irrelevant for Seventh

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58. *Id.* at 984-85.

59. Several Department of State recommendations are explicable only on political grounds. *See* Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974); Isbrandten Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971); Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961); Chemical Natural Resources, Inc. v. Venezuela, 420 Pa. 134, 215 A.2d 864 (1966); *see also* Hervey, *The Immunity of Foreign States When Engaged in Commercial Enterprises: A Proposed Solution*, 27 MICH. L. REV. 751, 751-52 (1929).

60. 28 U.S.C. §§ 1330, 1602-1611 (1976).

61. H.R. REP. No. 1487, 94th Cong., 2d Sess. 5, 7, 12 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6606, 6610 [hereinafter cited as H.R. REP. No. 1487].

62. 28 U.S.C. § 1605 (1976).

63. *Id.* § 1603(b)(2).

64. U.S. CONST. amend. VII.

65. 416 U.S. 363 (1974).

> Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty.[66]

Decisions following *Pernell* consistently recognize that the right to a jury trial does not depend "on the procedural situation at a given moment in the past, the time when the Seventh Amendment was adopted," but rather on the nature of the relief sought.[67] Actions unheard of at common law may require jury trials.[68]

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66. *Id.* at 375.

67. Cox v. C. H. Masland & Sons, Inc., 667 F.2d 138, 142 (5th Cir. 1979); e.g., Hildebrand v. Trustees of Mich. State Univ., 607 F.2d 705 (6th Cir. 1979) The court stated: "[T]he chief focus to be made when determining whether a jury trial right exists is the nature of the relief sought." *Id.* at 708.

68. The Second Circuit recognizes the right to a jury trial when an allegedly wrongfully expelled union member seeks damages in an action against his union. Feltington v. Moving Picture Mach. Operators, 605 F.2d 1251, 1257-58 (2d Cir. 1979). In Curtis v. Loether, 415 U.S. 189 (1973), the Court stated:

> Although the thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time. Mr. Justice Story established the basic principle in 1830:
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> > "The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence . . . By *common law,* the [Framers of the Amendment] meant . . . not merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights." *Parsons v. Bedford,* 3 Pet. 433, 446-47 (1830) (emphasis in original)."

Id. at 193. The Court in *Curtis* went on to say that the amendment's applicability to statutory actions is "too obvious to be doubted." *Id.* The Court cited as authority: Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477 (1962) (trademark laws); Hepner v. United States, 213 U.S. 103, 115 (1909) (immigration laws); Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916) (antitrust laws). *Curtis,* 415 U.S. at 193.

III. THE CASES

A. The Second Circuit — *Ruggiero v. Compania Peruana de Vapores*

In *Ruggiero v. Compania Peruana de Vapores*[69] three longshoremen seeking damages for personal injuries allegedly caused by defendants' negligence sued three shipping companies owned by foreign sovereigns.[70] Plaintiffs demanded a jury trial and defendants moved to strike the demand as inconsistent with the FSIA.[71] The district court granted defendants' motion but certified the question for interlocutory review.[72] The Second Circuit first considered defendants' argument that federal jurisdiction in suits against foreign, state-owned corporations must be based upon the FSIA, which precludes trial by jury.[73] The court reviewed the FSIA and its legislative history.[74] Section 1603 of the FSIA provides that a corporation owned by a foreign state is a foreign state for the purposes of the Act.[75] The FSIA amended the general federal removal statute[76] to expressly provide that a removed action against a foreign state "shall be tried by the court without a jury."[77] The court observed that the legislative history is also clear: "Actions tried by a court without a jury will tend to promote a uniformity in decision where foreign governments are involved."[78] The court concluded that the FSIA clearly does not

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69. 639 F.2d 872 (2d Cir. 1981).

70. The defendant shipping companies were owned by Peru, Poland, and Indonesia, respectively. *Id.* at 873.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 873-75.

75. 28 U.S.C. § 1603 (1976). That section provides in relevant part:

> For purposes of this chapter —
> (a) A foreign state . . . includes . . . instrumentality of a foreign state as defined in subsection (b).
> (b) An "agency or instrumentality of a foreign state" means an entity —
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state . . . .

Id.

76. 28 U.S.C. § 1441 (1948), *amended by* 28 U.S.C. § 1441 (1976).

77. *Id.* § 1441(d) (1976).

78. *Ruggiero*, 639 F.2d at 877 (citing H.R. REP. No. 1487, *supra* note 61 at 13, *reprinted at* 6611-12).

provide for trial by jury.[79] Plaintiffs argued that jurisdiction could be based upon diversity of citizenship statutes[80] as well as the FSIA when the defendant is a foreign corporation rather than a foreign government.[81] The court rejected this argument, saying that the same entity could not be a foreign state and a citizen of a foreign state.[82] The court concluded that actions against foreign, state-owned corporations must be brought under the FSIA and no right to a jury trial exists under that statute. The court then turned to the seventh amendment issue. The court stated that the seventh amendment merely preserves the right to a jury trial as it existed at common law.[83] The court said there was no right of action against a foreign state at common law.[84] Clearly, therefore, there could be no right in 1791 against "a foreign government or instrumentality thereof."[85] The United States established the right to sue foreign countries in United States courts, said the court, and this right may be conditioned upon the denial of a jury trial just as a citizen's right to sue the United States may be conditioned upon the absence of a jury trial.[86] The court rejected as insignificant the distinction between suits against a domestic sovereign and suits against a foreign sovereign.[87] Thus, concluded the court, no constitutional right to trial by jury exists in actions against foreign sovereigns and their instrumentalities.[88] Plaintiffs argued that the Supreme Court's decisions in *Pernell v. Southall Realty*[89] and *Curtis v. Loether*[90] required a contrary result.[91] The court distinguished those cases, noting that, when a domestic substantive law right is enlarged, the seventh amendment requires a jury trial only if the new substantive right is analogous to one at common law.[92] These decisions, opined the court, do not deal

79. *Id.* at 878.
80. *Id.* at 875.
81. *Id.*
82. *Id.*
83. *Id.* at 879.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 879-80.
88. *Id.* at 881.
89. 416 U.S. 363 (1974); *see supra* text accompanying notes 64-68.
90. 415 U.S. 189 (1974).
91. *Ruggiero,* 639 F.2d at 881.
92. *Id.*

with a defendant such as a foreign sovereign who was not amenable to suit at common law.

B. The Fourth Circuit—*Williams v. Shipping Corp. of India*

In *Williams v. Shipping Corp. of India*[93] a longshoreman filed suit in a Virginia state court against a corporation owned by the government of India, seeking damages for personal injuries allegedly caused by defendant's negligence. Defendant removed the action to federal court pursuant to 28 U.S.C. section 1441(d).[94] The trial court rejected the plaintiff's demand for a jury trial and plaintiff appealed.[95] The Fourth Circuit Court of Appeals' treatment of the statutory issue was simple: section 1441(d) expressly provides that upon removal, actions against foreign states and their instrumentalities shall be tried by the court without a jury.[96] The court, after an extensive review of the FSIA, concluded that the FSIA was the sole basis for federal jurisdiction over this action and that no jury trial was available in actions under the FSIA.[97] The Fourth Circuit's analysis of the seventh amendment was virtually identical to that of the Second Circuit, with one additional statement. The court concluded that because foreign sovereigns were not amenable to suit at common law, no right to a jury trial exists under the seventh amendment in actions against a corporation owned by a foreign sovereign.[98] The court expressly stated that, for a jury trial right to exist, "it is not enough that the nature of the plaintiff's action is 'legal', rather than maritime or equitable; the action must also be brought against a defendant who was sueable at common law in 1791."[99] The court cited no authority for this proposition and failed to distinguish actions against a foreign sovereign from actions against a corporation

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93. *Williams*, 653 F.2d 875 (4th Cir. 1981).

94. *Id.* at 877. Title 28, section 1441 of the United States Code provides:

> Any civil action brought in a State Court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury . . . .

28 U.S.C. § 1441(d) (1976).

95. *Williams*, 653 F.2d at 877.

96. *Id.* at 881; *see supra* note 94.

97. *Williams*, 653 F.2d at 881.

98. *Id.* at 883.

99. *Id.*

owned by a foreign sovereign.

C. The Third Circuit—*Rex v. Cia. Pervana de Vapores, S.A.*

In *Rex v. Cia. Pervana de Vapores, S.A.*,[100] plaintiff longshoreman sued a shipping company owned by the government of Peru for damages allegedly caused by defendant's negligence.[101] Plaintiff brought the action under the Longshoremen's and Harbor Workers' Compensation Act,[102] asserting jurisdiction on the bases of federal question, diversity of citizenship, and the FSIA.[103] The district court granted plaintiff's demand for a jury trial, refusing to regard the FSIA as the sole basis of federal jurisdiction in cases in which the defendant is a foreign corporation rather than a foreign government.[104] The court of appeals quickly disposed of the lower court's opinion. The Third Circuit noted the legislative history of the FSIA[105] and refused to recognize diversity of citizenship or federal question as appropriate bases for jurisdiction.[106] The court concluded that no statutory right to a jury trial exists in an action against a corporation owned by a foreign sovereign.[107]

Treating the constitutional question with greater circumspection, the court reminded itself that "it must be cautious to respect the presumption of constitutionality that is afforded acts of a coordinate branch of government."[108] The seventh amendment issue, the court said, must be considered in the context of congressional foreign policy objectives.[109] Reviewing *Curtis v. Loether*[110] and *Pernell v. Southall Realty*,[111] the court said that it did not "view the common law as frozen in 1791."[112] Plaintiff ar-

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100. *Rex*, 660 F.2d 61 (3d Cir. 1981).
101. *Id.* at 62.
102. 33 U.S.C. § 905(b) (1976).
103. *Rex*, 660 F.2d at 62.
104. *Id.*
105. *Id.* at 65.
106. *Id.* at 64.
107. *Id.* at 65.
108. *Id.*
109. *Id.* The court failed to note that one of the principal objectives of the Foreign Sovereign Immunities Act was to avoid foreign policy issues in these cases by ensuring that decisions are made on purely legal grounds. *See supra* note 61 and accompanying text.
110. 415 U.S. 189 (1973); *see supra* note 68.
111. 416 U.S. 363 (1974); *see supra* note 89.
112. *Rex*, 660 F.2d at 66.

gued that because he sought a legal remedy, damages, he was entitled by the seventh amendment to a jury trial.[113] The court rejected this argument, citing a long line of cases[114] which hold that the United States need not subject itself to a jury trial when it consents to be sued.[115] The court then reviewed the history of sovereign immunity and concluded that the right of action against a foreign sovereign has always existed at the sufferance of the Department of State.[116] The majority opinion considered the effect of the FSIA on this history and again emphasized the importance of congressional foreign policy objectives.[117] The court of appeals concluded that "a suit against a foreign sovereign in district court pursuant to the FSIA is not a suit at common law within the meaning of the seventh amendment, and therefore . . . the denial of jury trial in the Act does not violate the Constitution."[118] "[V]alid and legitimate [congressional] foreign policy concern[s]" constituted the crux of the majority's reasoning.[119]

Judge Sloviter raised three points in dissent. First, he criticized the majority's treatment of the seventh amendment. He considered improper the majority's emphasis on the defendant's amenability to suit at common law.[120] The dissent stated that the nature of the remedy plaintiff sought determined the existence of any right to a jury trial.[121] Second, Judge Sloviter objected to the analogy between suits against the United States and suits against foreign sovereigns.[122] The immunity of the United States depends upon "a variety of constitutional, historical and metaphysical principles," whereas the immunity of foreign sovereigns "stems from notions of comity and expediency in the conduct of foreign affairs."[123] Third, the dissent criticized the majority for failing to

113. *Id.* at 66-67.

114. *Id.* at 67. The court cited, *inter alia*, Galloway v. United States, 319 U.S. 372 (1943), and Lehman v. Nakshian, 453 U.S. 156 (1981).

115. *E.g.*, Glidden Co. v. Zdanok, 370 U.S. 530 (1962); United States v. Sherwood, 312 U.S. 584 (1941); McElrath v. United States, 102 U.S. 426 (1880).

116. *Rex*, 660 F.2d at 68.

117. *Id.* at 68-69. The court did not explain what foreign policy objectives it or Congress considered.

118. *Id.* at 69.

119. *Id.*

120. *Id.* at 70.

121. *Id.*

122. *Id.* at 70-71.

123. *Id.* at 71.

recognize "a distinction historically observed between the foreign sovereign itself and its ownership interests."[124] The dissent reviewed *Coale v. Société Cooperative Suisse des Charbons*[125] and *United States v. Deutsche Kalisyndikat Gesellschaft,*[126] and cited a series of other opinions recognizing the distinction between a corporation owned by a foreign sovereign and the sovereign itself.[127] The dissent further relied upon a line of cases, beginning with *Planter's Bank,* holding that a corporation owned by the United States is distinct from the United States and is not entitled to immunity.[128] Finally, Judge Sloviter criticized the majority for allowing an alleged foreign policy objective to override a fundamental constitutional right.[129] He concluded that a tort action against a corporation owned by a foreign sovereign is a legal action analogous to one at common law within the meaning of the seventh amendment, thus entitling the plaintiff to trial by jury.[130]

IV. Analysis

Each of these decisions treated the statutory issues properly. Although Congress could have been more artful in its legislative drafting, it clearly intended that the FSIA be the sole basis for federal jurisdiction in actions against foreign sovereigns and their instrumentalities and that jury trials not be available.[131] The constitutional question is a different matter. Judge Sloviter, in his dissent, correctly identified the courts' errors.[132] First, the Second and Fourth Circuits' static approach to the seventh amendment is improper because of the Supreme Court's decision in *Pernell v.*

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124. *Id.* at 72-74.

125. 21 F.2d 180 (S.D.N.Y. 1921). *See supra* text accompanying notes 44-55.

126. 31 F.2d 199 (S.D.N.Y. 1929). *See supra* text accompanying notes 44-55.

127. *Rex,* 660 F.2d at 72.

128. *Id.* at 73.

129. *Id.* at 75.

130. *Id.* at 76.

131. *See supra* notes 65-79 and accompanying text. Some district courts have improperly tortured the statutory language in an attempt to avoid the constitutional question. *E.g.,* Houston v. Murmansk Shipping Co., 87 F.R.D. 71 (D. Md. 1980), *rev'd and remanded,* 667 F.2d 1151 (4th Cir. 1982); Lonon v. Companía de Navegaco, 85 F.R.D. 71 (E.D. Pa. 1979); Icenogle v. Olympic Airways, 82 F.R.D. 36 (D.D.C. 1979).

132. Rex v. Cia. Pervana de Vapores, S.A., 660 F.2d 61, 70 (3d Cir. 1981); *see supra* text accompanying notes 120-30.

Southall Realty.[133] The Third Circuit claimed that it rejected a static interpretation, but the court's analytical approach contradicts its statement. The Second and Fourth Circuits refer to a requirement that the defendant be sueable at common law. This position is faulty in two respects. First, no authority exists for this proposition. Second, this proposition assumes there is no distinction between a foreign sovereign and its corporations. The seventh amendment may require trial by jury in actions unheard of at common law.[134] Therefore, even if the distinction is unimportant here, the static approach used by all three courts is erroneous.

An analogy between suits against the United States and suits against instrumentalities of foreign states is inappropriate. The conceptual bases for the two types of immunity are completely different. The United States immunity from suits by its citizens is grounded on the notion that there can be no right of action against the entity upon whom the right depends.[135] The foreign sovereign's immunity, however, is based upon the consent of the host nation.[136] The immunity is presumed not to exist in the absence of the host nation's consent. The instant decisions reverse this proposition by maintaining that immunity is presumed to exist absent the host nation's declaration to the contrary. Even if the foreign sovereign's amenability to suit exists "at the sufferance of the United States Department of State,"[137] Congress recognized the political problems in maintaining that position and enacted the FSIA. Because the conceptual bases for the two types of immunity are distinct, any analogy between them is inappropriate.

A clear line of authority recognizes the distinction between a foreign sovereign and its corporations.[138] The Second Circuit recently recognized this distinction in a different legal context. In *Banco Para el Comercio v. First National City Bank*[139] the court refused to hold that "a trading corporation wholly owned by a foreign government, but created and operated as a separate jurid-

133. 416 U.S. 363 (1974); *see supra* text accompanying notes 64-68.
134. *See supra* note 68 and accompanying text.
135. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).
136. The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 135 (1812).
137. *Rex*, 660 F.2d 61, 68 (3d Cir. 1981).
138. *See supra* text accompanying notes 44-55.
139. 658 F.2d 913 (2d Cir. 1981).

ical entity," may be held liable for the acts of the sovereign that owns it.[140] This decision effectively held that the nonimmunity of the corporation does not affect the immunity of the sovereign because the entities are distinct. The Second Circuit refuses, however, to recognize the distinct nature of the entities in the instant context. By congressional fiat, a foreign sovereign and a corporation owned by the sovereign are considered the same entity under the FSIA.[141] Allowing the very statute under constitutional attack to overrule a long, clear line of authority is erroneous.

Finally, each of the instant courts emphasized congressional foreign policy objectives.[142] These objectives are entitled to substantial weight, but it is improper for these policy factors to override a fundamental constitutional right. Allowing Congress to define away a long established distinction between corporations and their owners and thus defeat a fundamental constitutional right is, as Judge Sloviter put it, playing "Polonius to Congress' Hamlet."[143]

V. Conclusion

The proper approach to these cases is to face the seventh

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140. *Id.* at 920.

141. 28 U.S.C. § 1603 (1976). For the relevant text of that statute, *see supra* note 75.

142. *Rex*, 660 F.2d at 69; Williams v. Shipping Corp. of India, 653 F.2d 875, 879 (4th Cir. 1981); Ruggiero v. Compania Pervana de Vapores, 639 F.2d 872, 880 (2d Cir. 1981). The example of Santa Fe International illustrates the impropriety of this approach. Santa Fe, formerly a United States corporation, was purchased by Kuwait in late 1981. Wall St. J., Nov. 29, 1982, at 1, col. 6. Because Kuwait owns a controlling interest in Santa Fe, the corporation is a foreign sovereign within the meaning of the FSIA. 28 U.S.C. § 1603(b)(2). Under the analysis used by the courts in these cases, the fact that Kuwait purchased Santa Fe is alone sufficient to remove the plaintiff's jury trial right in a legal action. It is difficult to comprehend the foreign policy objectives furthered by this legal result.

143. *Rex*, 660 F.2d at 76 (Sloviter, J., dissenting).

HAMLET: Do you see yonder cloud that's almost in shape of a camel?
POLONIUS: By th' mass and 'tis, like a camel indeed.
HAMLET: Methinks it is like a weasel.
POLONIUS: It is backed like a weasel.
HAMLET: Or like a whale.
POLONIUS: Very like a whale.

W. Shakespeare, Hamlet, Prince of Denmark, act III, scene ii (Penguin ed. 1969).

amendment issue squarely. A suit in law against a corporation owned by a foreign sovereign is clearly an action covered by the seventh amendment as that amendment was interpreted by *Pernell v. Southall Realty*. Even if Congress can place conditions on the right to sue a foreign sovereign, a suit against the sovereign's corporations is a different matter. Foreign sovereigns are distinct from the corporations they own. As more governments engage in commercial activities by forming corporations, it becomes imperative that a plaintiff suing a corporation owned by a foreign sovereign retain his seventh amendment guarantees.

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